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No. 09-785

In the

Supreme Court of the United States

CHRISTOPHER F. COREY,

Petitioner,

v.

MELNOR, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a federal district court striking a defendant's defenses and entering judgment against the defendant as a sanction for the defendant's obstruction of the judicial proceedings in a fraud action collaterally estops the defendant from denying the fraud in a later bankruptcy case brought by the defendant?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Melnor, Inc. declares that it is not a publicly held corporation. Melnor, Inc. is unsure of the meaning of "parent" corporation; however, Nies Holding, LLC and Marvelous Time Company, Ltd. are stockholders of Melnor, Inc. No publicly held corporation owns 10% or more of Melnor, Inc.'s stock.

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STATEMENT OF THE CASE

On December 17, 2004, Melnor, Inc. ("Melnor") filed a complaint against Christopher A. Corey ("Corey") and SKR Resources, Inc., ("SKR") in the United States District Court of the Western District of Virginia (the "Virginia District Court"), alleging fraud, unjust enrichment, and constructive fraud (the "Virginia Fraud Action"). Melnor also alleged that SKR was a defunct entity and the *alter ego* of Corey and that Corey was personally liable for the debts and actions of SKR. *See* Petitioner's App. 37-38. The essence of the complaint was that SKR and Corey had induced Melnor by false representations to transfer to SKR and Corey goods worth approximately $435,000.00, and both SKR and Corey had subsequently failed to fulfill their promises to compensate Melnor for those goods. *Id.*

SKR made an appearance in the case by its counsel, Steffanie J. Lewis, who also represented Corey and, on Corey's behalf, contested the jurisdiction of the Virginia District Court over him, as evidenced by a motion to dismiss filed on or around August 18, 2005. *Id.* at 38. By a letter dated September 15, 2005, Corey requested that Ms. Lewis withdraw as counsel for SKR. *Id.* This letter is but one example of the fact that Corey acted for both himself and for SKR during the Virginia Fraud Action.

By a Memorandum Opinion dated November 10, 2005 and a Judgment Order and a Memorandum Opinion dated November 21, 2005, the Virginia District Court entered a default judgment against SKR. *See id.* at 38-39. Later, on April 5, 2006, the Virginia District Court entered a Final Judgment

Order against SKR that included an award of attorneys' fees. *See id.*

On December 9, 2005, the Virginia District Court entered a written order allowing Ms. Lewis to withdraw as counsel for Corey. *Id.* at 38. On December 12, 2005, Corey, acting *pro se*, filed an answer for himself in the case. *Id.* at 39. He continued to represent himself, answering discovery, making discovery requests, requesting a jury trial, subpoenaing documents from third parties, filing a motion to compel the production of documents, and filing a list of witnesses in preparation for trial. *See id.* at 18.

While represented by Ms. Lewis and also while proceeding *pro se*, Corey repeatedly obstructed the legal proceedings in the Virginia Fraud Action. He refused to respond to Melnor's discovery forcing Melnor to file two Motions to Compel. When he finally responded, his responses were inadequate and calculated to prohibit Melnor from completing its discovery. *See id.* at 18. He also refused to appear for his deposition until the Virginia District Court entered an order compelling it. He specifically requested March 28, 2006 as a date for a hearing, then failed to appear, requiring counsel for Melnor to travel two and one half hours one way from Winchester, Virginia to Charlottesville, Virginia. *See id.* at 18-19. After Corey's failure to appear at the March 28, 2006 hearing, and in response to all of his inappropriate and obstructive actions, the magistrate Judge issued a Report and Recommendation on March 30, 2006, in which it recommended that Corey's defenses be struck as a sanction for his obstruction. *Id.* at 39-40. In the Report and Recommendation, the magistrate Judge

stated that "the monetary sanctions heretofore endorsed are not adequate" and that "Corey's conduct almost blatantly caused plaintiff to incur expenses preparing and attending the hearing, and finally noting that "there have been prior occasions when matters were set before the court which Corey sought to avoid." *Id.*

In accordance with the recommendation of the magistrate judge, the Virginia District Court issued an order dated May 4, 2006, by which the Virginia District Court struck Corey's defenses "as a sanction for Corey's failure to appear at a scheduled hearing and for Corey's overall failure to meaningfully participate in discovery." *Id.* at 40-41. The Virginia District Court further stated

> that this sanction is not simply a response to Corey's failure to appear at a single hearing but, rather, is the culmination of a course of obstructive behavior on the part of the defendants which has effectively prevented the court from proceeding to the merits of the underlying dispute. . . . [T]he record reflects a pattern of behavior on the part of the defendants seemingly aimed at preventing the court from ever reaching the merits of [Melnor's fraud claim]. . . . The record shows that Corey has obstructed the course of discovery by preventing the court from setting and completing essential hearings and by attempting to excuse his behavior by incredibly asserting that he has not received the court's notices. The court finds that striking Corey's defenses and moving forward to the issue of damages is the only way the court can advance this case toward its

> ultimate resolution. The court is satisfied that any lesser sanction would only enable further delays by Corey. Accordingly, the court **ADOPTS** [the magistrate judge's] Report and Recommendation in its entirety and hereby **STRIKES** Corey's defenses.

Id. at 40-41 (emphasis in original).

The Virginia District Court set the matter for trial on May 23, 2006, a date which Corey had previously advised the court was convenient, on the sole remaining issue of damages, the issue of fraud having been completely resolved by the order of May 4, 2006. *See id.* at 41. The trial was to be a jury trial, Per the request of Corey, the issue of damages was to be tried before a jury. *Id.* On the date of trial, however, Corey did not appear. *Id.*

In a Memorandum Opinion dated May 24, 2006, the Virginia District Court noted that it had "struck Corey's defenses as a sanction for his course of obstructive behavior." *Id.* at 20. The Virginia District Court then noted that by his failure to appear at trial, Corey was in default on the issue of damages as well. *See id.* at 20-21. In adjudicating an award of interest, the Virginia District Court further noted: "in light of the course of dealing to which Corey has effectively admitted and in light of the fact that Corey has unjustifiably retained Melnor's otherwise sellable goods, the court finds that such an award is appropriate here." Finally, the Virginia District Court noted that Virginia law permits an award of

> reasonable attorneys fees to a successful plaintiff in a fraud action. [Citation omitted.] By virtue of Corey's default, Melnor has

> succeeded in their fraud action, and, in light of the complexity and duration of the case and the unnecessarily protracted course of litigation Corey's actions have yielded, the court . . . will award Melnor its attorneys fees.

In accordance with this Memorandum Opinion, the Virginia District Court entered a Judgment Order against Corey on May 24, 2006, in the amount of $428,624.07, plus interest, and awarded attorneys' fees in the amount of $94,357.84. *Id.* at 41-42. The Virginia District Court further noted that Corey's liability was joint and several with the liability of SKR, under the judgment issued in relation to SKR on April 5, 2006.

After entering judgment against Corey, the Virginia District Court further sanctioned him based on his failure to appear for trial without notice to the court after he requested that the court assemble a jury. As a sanction for this failure, the Virginia District Court ordered that Corey also be taxed the jury costs.

Melnor recorded the judgment in Kansas on July 17, 2006. *Id.* at 42. Subsequently, Corey filed for bankruptcy protection under Chapter 7 on March 8, 2007 (the "Bankruptcy Action") in the United States Bankruptcy Court for the District of Kansas (the "Bankruptcy Court"). *See id.*

On May 23, 2007, Melnor filed an adversary proceeding in the Bankruptcy Action and made two arguments. *See id.* at 34-36. First, Melnor argued that pursuant to 11 U.S.C. § 727(a)(4)(A), Corey was not entitled to a discharge of the default judgment from the Virginia Fraud Action because Corey made a false representation in his bankruptcy petition by

stating that the default judgment from the Virginia Fraud Action was actually a "business loan cosigned." *Id.* at 35-36. Second, Melnor argued that pursuant to 11 U.S.C. § 523(a)(2)(A), the default judgment from the Virginia Fraud Action was nondischargeable in bankruptcy, because it represented a debt for property obtained by fraud. *Id.* Melnor further argued as part of this second argument that the default judgment from the Virginia Fraud Action collaterally estops Corey from denying fraud in the Bankruptcy Action. *Id.*

Corey responded with a motion to dismiss. *Id.* at 36. Melnor subsequently filed a motion for summary judgment. *Id.* Melnor also attached an amended complaint to the motion for summary judgment and requested leave to file the amended complaint in the unlikely event that the Bankruptcy Court did not issue an order declaring the default judgment from the Virginia Fraud Action to be nondischargeable. *See id.* Corey responded with a cross-motion for summary judgment. After considering the arguments, the Bankruptcy Court issued a Memorandum Opinion and a Judgment Order on December 21, 2007 ("Memorandum Opinion"). *Id.* at 34-66.

On the false representation issue raised pursuant to 11 U.S.C. § 727(a)(4)(A), the Bankruptcy Court granted Corey's motion for summary judgment and denied Melnor's motion for summary judgment. *Id.* at 65. Melnor did not appeal this decision.

However, on the collateral estoppel issue raised pursuant to 11 U.S.C. § 523(a)(2)(A), the Bankruptcy Court granted Melnor's motion for summary judgment and denied Corey's motion to dismiss and

Corey's cross-motion for summary judgment. *Id.* The Bankruptcy Court expressly stated that the default judgment against Corey in the Virginia Fraud Action "***was entered by default as a sanction for [Corey's] abusive litigation conduct,***" and therefore "collateral estoppel bars Corey from litigating whether the claim is a debt for money, property or services obtained by fraud and the amount of the debt." *Id.* (emphasis added).

From the Bankruptcy Court's decision disposing of the issues raised pursuant to 11 U.S.C. § 523(a)(2)(A), Corey filed an appeal to the United States Bankruptcy Appellate Panel of the Tenth Circuit ("BAP"). *See id.* at 10-11. The parties submitted briefs and presented oral argument to the BAP. The BAP subsequently affirmed the judgment of the Bankruptcy Court stating that

> it is undisputed that the Virginia District Court found Corey's litigation tactics, including his failure to appear at trial, seriously obstructive, resulting in the entry of the Virginia Judgment adverse to Corey.

Id. at 31. The BAP ultimately concluded that the Bankruptcy Court did not abuse its discretion in finding that collateral estoppel applied and the "Virginia Judgment precluded relitigation of the issues of fraud and damages in the Section 523(a)(2) proceeding." *Id.* at 32-33.

Corey then appealed the BAP's decision to the United States Court of Appeals for the Tenth Circuit. *Id.* at 1-2. The Tenth Circuit, in turn, affirmed the Bankruptcy Court's decision, holding that "Mr. Corey actually litigated Melnor's fraud claim" and "the default was not entered because of

Mr. Corey's failure to contest the issue but rather because his efforts in contesting it were abusive." *Id.* at 2.

From the Tenth Circuit's affirmation of the Bankruptcy Court's decision, Corey filed his Petition for Writ of Certiorari to this Court.

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari ("Petition") should be denied because (a) Corey's argument is based on a factual dispute with the findings of fact made by the Bankruptcy Court, and (b) the Tenth Circuit's decision is well-reasoned, it is consistent with the decisions of all the other Circuit Courts which have considered this issue, and it is supported by sound public policy.

I. COREY'S ARGUMENT IS BASED ON A FACTUAL DISPUTE WITH THE FINDINGS OF FACT MADE BY THE BANKRUPTCY COURT.

Melnor disputes Corey's recitations of facts in his Statement of the Case. As stated in Melnor's Statement of the Case, the Bankruptcy Court expressly found that the judgment entered against Corey in the Virginia Fraud Action "was entered by default as a sanction for [Corey's] abusive litigation conduct." *Id.* at 65. Both the BAP and the Tenth Circuit recognized and confirmed this factual finding by the Bankruptcy Court. *See id.* at 2, 31.

Nevertheless, Corey disputes this finding of fact. In the Petition, Corey claims that the default judgment in the Virginia Fraud Action was instead entered "for not appearing at trial" and that the "judgment [in the Virginia Fraud Action] was not entered as a sanction of any kind." Petition 6.

Corey's arguments in the Petition are based on this disputed fact. He argues that collateral estoppel should not apply in this case because there was never any "bad intent or deliberate obstruction" on his part. *Id.* at 16. Corey also repeatedly argues

that Melnor's fraud claim in the Virginia Fraud Action was not litigated in complete disregard to the Bankruptcy Court's finding that his obstructive behavior prevented it from being litigated. *See id.* at 6, 16-17. Furthermore, all the cases on which he relies in the Petition involve defendants who had default judgments entered against them, not because they were sanctioned for obstructing the litigation, but because they simply stopped litigating. *See id.* at 11-17; *Federal Insurance Company v. Gilson (In re Gilson)*, 250 B.R. 226, 235 (Bankr. E.D. Va. 2000) (finding that besides not responding to discovery, debtor did not hinder or delay the judicial process); *Marlee Electronics Corp. v. Antonakis (In re Antonakis)*, 207 B.R. 201, 206 (Bankr. E.D. Ca. 1997) (finding that the debtor in that case "did not engage in any abuse of the judicial process").

All of these arguments by Corey are undermined by the factual finding of the Bankruptcy Court that the judgment against Corey was entered as a sanction for his "abusive litigation conduct" after the Virginia Court found that Corey's "obstructive behavior... has effectively prevented the [Virginia] court from proceeding to the merits of the underlying dispute." Petitioner's App. 40-41. This finding by the Bankruptcy Court may only be reversed if it is "clearly erroneous" and Corey has not so argued. *See* Fed. R. Civ. P. 52(a). Since Corey's arguments in the Petition are based on a dispute of fact, Melnor respectfully requests that the Petition be denied.

II. THE TENTH CIRCUIT'S DECISION IS WELL-REASONED.

This Court has previously held that collateral estoppel or issue preclusion applies "when an issue

of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." *Arizona v. California*, 530 U.S. 392, 414, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000) (quotations omitted). Applying this rule in its decision on this matter, the Tenth Circuit distinguished between default judgments entered for failure to contest an issue, which do not satisfy the "actually litigated" requirement, and default judgments entered as a sanction for abusive litigation tactics. Petitioner's App. 4-5. The Tenth Circuit then affirmed the factual findings of the Bankruptcy Court above and held that the judgment against Corey in the Virginia Fraud Action "was not entered because of Mr. Corey's failure to contest the issue but rather because his efforts in contesting it were abusive." *Id.* at 2, 3. As a result, the Tenth Circuit held that "Mr. Corey actually litigated Melnor's fraud claim" in the Virginia Fraud Action and issue preclusion precluded him from "contesting in this adversary proceeding that he committed fraud." *Id.* at 2, 9.

A. The Tenth Circuit's decision is consistent with the decisions of all other circuit courts which have considered this issue.

All other federal circuit courts which have heard similar cases have reached the same conclusion as the Tenth Circuit in this case. In *FDIC v. Daily (In re Daily)*, 47 F.3d 365 (9th Cir. 1995), the Ninth Circuit held that "a party who deliberately precludes resolution of factual issues through normal adjudicate procedures may be bound, in subsequent, related proceedings involving the same parties and issues, by a prior judicial determination reached without completion of the usual process of

adjudication." *Id.* at 368. The Ninth Circuit further held that the actually litigated requirement of collateral estoppel discussed above may be satisfied in such a situation. *Id.*

In *Wolstein v. Docteroff (In re Docteroff)*, 133 F.3d 210 (3rd Cir. 1997), the Third Circuit held that the actually litigated requirement of collateral estoppel was satisfied by a default judgment entered because the defendant had "decided to frustrate orderly litigation by willfully obstructing discovery." *Id.* at 215.

In *Bush v. Balfour Beatty Bahamas, Ltd. (In re Bush)*, 62 F.3d 1319 (11th Cir. 1995), the Eleventh Circuit held that it was within the sound discretion of the trial court to apply collateral estoppel to prevent re-litigation of an issue when a debtor, in the previous litigation, engaged in "dilatory and deliberately obstructive conduct and a default judgment, based on fraud, was entered as a sanction against him." *Id.* at 1324-25.

Corey does not attempt to factually distinguish these cases from his own, and he admits that there is no circuit split in this matter. Instead, he implies that there is a split between two bankruptcy courts (*Gilson* and *Marlee*), and the four circuit courts listed above and this split warrants this Court granting his Petition. *See* Petition 19. However, he ignores the salient distinguishing fact of the *Gilson* and *Marlee* cases not present here. Specifically, in both *Gilson* and *Marlee*, there was no finding of any obstructive or abusive behavior on the part of the defendant. *See Gilson*, 250 B.R. at 230-31, 35; *Marlee*, 207 B.R. at 206. In this case and those before the circuit courts listed above, the default judgment was

entered as a result of obstructive and/or abusive litigation behavior. Petitioner's App. at 2; *Docteroff*, 133 F.3d at 215; *Bush*, 62 F.3d at 1324; *Daily*, 47 F.3d at 368. Furthermore, Melnor respectfully suggests that even if there was a true dispute between a bankruptcy court and multiple circuit courts, the circuit courts are capable of resolving such a dispute without burdening this Court with the matter.

B. The Tenth Circuit's decision is supported by sound public policy.

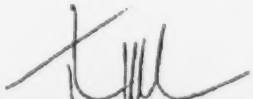
In addition to being supported by the other circuit courts' decisions listed above, the Tenth Circuit's opinion in this matter is also supported by public policy considerations. If Melnor's fraud claim must be relitigated in the Bankruptcy Court, then Corey will be rewarded for his flagrant abuse of the judicial system, and Melnor will be prejudiced by having to litigate the fraud claim all over again.

If Melnor is forced to relitigate the fraud claim, then the efficiency of the court system will be undermined and other defendants in fraud actions will have an incentive to be as recalcitrant and uncooperative as possible in the hope of gaining a benefit from abusing the judicial process. The doctrine of collateral estoppel helps prevent this type of abuse of the judicial system and it should be applied in this case.

CONCLUSION

For the reasons set forth above, Melnor respectfully asks this Court to deny the Petition.

Respectfully submitted,



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